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No. 04-488

Supreme Court, U.S.
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In The
Supreme Court of the United States

REBECCA CRYSTIAN, et al.,

Petitioners,

vs.

TOWER LOAN OF MISSISSIPPI, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners' attempt to present a single abstract question regarding the right of a class member under Federal Rule of Civil Procedure 23(b) or the Due Process Clause to opt out of the class is improper on this record. If the record is properly characterized, Petitioners seek reconsideration of the following issue:

> Where a class has been certified under Rule 23(b)(1)(A) due to plaintiffs' pursuit in competing actions of injunctive relief to restructure defendants' business practices and objecting class members contested the class certification through their own counsel, whether objecting class members' rights under Rule 23 or the Due Process Clause are denied when the district court declines to allow them to opt out of the class based on a factual finding that the class members did *not* possess unliquidated, individualized substantial damages claims.

CORPORATE DISCLOSURE STATEMENT

Tower Loan of Mississippi, Inc., First Tower Loan, Inc., American Federated Insurance Company, and American Federated Life Insurance Company are wholly owned subsidiaries of First Tower Corp. No publicly held corporation owns 10% or more of the stock of First Tower Corp.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Tower Loan of Mississippi, Inc. and First Tower Loan, Inc. (collectively "Tower"), and Respondents American Federated Life Insurance Company and American Federated Insurance Company (collectively "American Federated"), oppose the petition for writ of certiorari. This fact-driven controversy does not present an issue warranting this Court's intervention.

There is no certworthy split of authority among the courts of appeals pertinent to the resolution of this case. That this Court in 1994 and 1997 dismissed writs as improvidently granted on a question of opt-out rights for damages claims is not adequate ground for issuance of a writ here. Decisions of the courts of appeals since 1997 demonstrate there is no material conflict among them concerning certification of a mandatory class under Rule 23(b)(1)(A), or Rule 23(b)(2), where there are no substantial damages claims. Moreover, the Petitioners largely argue in the teeth of the judicially established factual record and beyond issues presented to or addressed by the court of appeals. The specific factual determinations of the district court, which were not disturbed on appeal, and the court of appeals' per curiam affirmance, in which it found any consideration of Rule 23(b)(2) to be unnecessary, render this case a particularly inappropriate vehicle for review of the question Petitioners attempt to present.

STATEMENT OF THE CASE

1. ***The Nature of the Litigation.*** Law and regulation, as well as business necessity, dictate that Tower

and American Federated treat all borrowers the same. Tower utilizes uniform finance charges, the same forms, the same disclosures, and a uniform practice for refunding unearned finance charges throughout its loan business. American Federated charges uniform premiums, refunds unearned premiums in a uniform manner, and utilizes the same approved insurance forms. (9/9/98 Exh. D-5, ¶¶ 6, 7)

This class action is a comprehensive borrower assault on the uniform business practices of Tower and American Federated. Borrowers in this class action proceeding and in numerous competing parallel state-court multi-plaintiff copycat actions seek to conduct a referendum on the small loan industry. They seek a substantial restructuring of the regulated business practices of Tower and American Federated, reimbursement of insurance premiums and other loan charges allegedly unlawfully imposed, and punitive damages predicated on alleged wanton conduct uniformly directed at all borrowers. Virtually all the competing cases demand injunctive and other relief that would subject Tower and American Federated to an impossible array of conflicting standards if the multiple cases were allowed to proceed.

The class action complaint characterizes this class action as "a combination contract, tort and statutory action . . . for restitution, for declaratory, injunctive and equitable relief, and for punitive damages." (9/9/98 Exh. D-1, ¶ 24) As found by the district court, the relief sought by the class is essentially three-fold: (i) The Class demands "declaratory and injunctive relief revamping pursuant to a court-ordered plan the documents, practices, policies and procedures under which credit insurance may be sold, financed and administered." (Mem. Op. (9/9/98) at 6) (ii)

The Class seeks compensatory damages in the form of "restitution through disgorgement by defendants of the finance charges and insurance premiums allegedly unlawfully collected, together with fees and interest." *Id.* (iii) The Class pursues "punitive damages arising out of the alleged unlawful insurance practices uniformly applied to tens of thousands of borrowers." *Id.*

At the time the district court first addressed class certification on the merits, twenty-one other lawsuits were pending against Tower and, in most instances American Federated, in nine separate Mississippi state courts, bankruptcy court and the Hattiesburg Division of the United States District Court for the Southern District of Mississippi. (9/9/98 Exh. D-3(a)-(u)) In multiple actions pending in different Mississippi state courts Tower borrowers situated similarly to the class representative had specifically requested, among other things, "the following equitable relief":

> b. an order enjoining Defendants from engaging in further unfair, misleading and deceptive practices regarding the manner in which it procures and/or provides and places credit life, credit disability and property insurance *on the Plaintiffs and others, as well as future borrowers;*. . . .
>
> g. a Court order requiring the Defendants to terminate all force placement of credit life, credit disability and property insurance *unless and until the proposed plan is submitted to and approved by the Court.*

(9/9/98 Exh. D-3(a), D-3(d) thru 3(i), Count XII) (emphasis added) (*see also* 9/9/98 Exh. D-3(b), D-3(c), Count XII)

Named Petitioner Crystian is among 317 Tower borrowers who purported to join identical claims against Tower and American Federated in a single state court action. ("*Barnes*"; 9/9/98 Exh. D-3(o)) *Barnes* is one of two copycat state court actions filed by former class counsel in *Bryant Jones*[1] on the heels of their abandonment of the *Bryant Jones* settlement. The other complaint filed by former *Bryant Jones* class counsel purported to join the identical claims of 339 Tower borrowers in a different state court. ("*Arbuthnot*"; 9/9/98 Exh. D-3(n)). Other Petitioners are plaintiffs in yet another similar state court action filed later by former *Bryant Jones* class counsel.[2] ("*Alexander*"; 9/9/98 Exh. D-3(l))

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[1] *Bryant Jones* refers to the predecessor identical class action discussed by Petitioners. Petitioners pointlessly refer to remarks made by the district judge in *Bryant Jones* in the context of dismissal of class allegations after class counsel abandoned the class when unable to obtain a desired settlement. The district court here rendered its decision on an extensive record after careful inquiry into all the facts, including the facts exhibited in the history of the *Bryant Jones* case.

[2] Petitioners' declaration that their state-court cases "did not seek class certification" (Pet. 4), while technically accurate due to the absence of "Rule 23 class actions" in Mississippi state court practice, is misleading with regard to the form and practical effect of Petitioners' state-court actions. While technically not class actions, Petitioners' state-court cases also were not *individualized* actions in any meaningful sense. They were all massed multi-plaintiff cases that exploited the liberal joinder and venue rules then in effect in Mississippi to achieve something tantamount to an *unregulated* class action. Indeed, Petitioners' counsel acknowledged when questioned by the district court that their individual cases challenging the defendants' common institutionalized practices would be "lumped" together in state court under the liberal joinder and venue rules mentioned above, because "that's what plaintiffs' lawyers do in the State of Mississippi in state court." (R. Vol. 12 Tr. 287-88)

2. The Original Class Certification and Class Member Challenges. Confronting the multiple borrower challenges of Tower's business practices posed by the class complaint and competing actions, the district court certified the class pursuant to its original order of class certification (R. 189) and supporting memorandum opinion issued on September 9, 1998. (R. 164) The district court first found certification to be warranted under Rule 23(b)(1)(A) based on factual findings that the class complaint and multiple other pending civil actions filed by class members challenged Tower's business practices necessarily uniformly applied and sought considerable injunctive relief which created a risk of inconsistent or varying adjudications that would establish incompatible standards for Tower. Additionally and alternatively, the district court certified the class under Rule 23(b)(2) based on factual findings of the predominance of injunctive relief under the Fifth Circuit's criteria in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). The district court found the demands for monetary relief to be in the nature of an equitable demand for restitution and in any event "incidental" under *Allison* as readily capable of computation based on objective standards without the necessity of individualized hearings.[3] The court formally enjoined any future filings of similar lawsuits and stayed all parallel proceedings by class members. (Pet. 17a-19a)

When the district court certified the class and stayed parallel proceedings, named Petitioner Crystian and many other Petitioners who were state court litigants at the time unsuccessfully sought in the district court relief from the

[3] Additionally in the alternative, the district court certified the class under Rule 23(b)(1)(B).

stay. They then appealed. On July 13, 2000, the court of appeals found that the district court did not abuse its discretion by staying parallel proceedings and declined to exercise jurisdiction over the class certification order. (Pet. 19a)

Following the remand, former class counsel and others, including named Petitioner Crystian and the majority of the other Petitioners, again moved the district court to lift the stay of parallel proceedings. (9/20/01 Exh. D-30) On September 20, 2001, the district court conducted a hearing to allow movants challenging the class certification to submit evidence and oral arguments in support of their challenges. (R. Vol. 13 Tr. 6-7) Counsel for other class members seeking to intervene and address class certification issues appeared. (R. Vol. 13 Tr. 2, 8, 88-97, 104-09) Such counsel were permitted to participate in the hearing and to make additional submissions. (R. Vol. 13 Tr. 146-59) (Pet. 20a)

Indeed, one of the objecting class members' lawyers testified. From the witness stand, the lawyer characterized the objecting class members' claims as just like those of the class representative. He emphasized Tower was for all practical purposes the class members' only source of credit. He complained that Tower continued to prey on his clients and other borrowers. Contrary to Petitioners' characterization of demands for injunctive relief as "boilerplate," the testifying lawyer insisted injunctive relief was necessary to restructure Tower's practices. (R. Vol. 13 Tr. 21-24, 38, 43, 51, 52, 55, 56, 61, 62) (Pet. 20a)

At the September 20, 2001 hearing and thereafter, the district court *sua sponte* raised the issue of continued class

certification under Rule 23(b)(1)(B) in light of this Court's decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). *Ortiz* had been decided after the September 1998 class certification and stay while those rulings were on appeal to the Fifth Circuit. On September 28, 2001, the district court denied the motion for lifting of the stay but explicitly reserved "the right to reconsider this ruling in conjunction with the court's decision on other matters including, *inter alia*, motions to sever, intervene and reconsider class certification." (R. 717) On December 3, 2001, the clerk entered the court's order rescinding the class certification under Rule 23(b)(1)(B) and affirming continued certification under Rules 23(b)(1)(A) and (b)(2). (R. 883)

3. *Settlement Approval Proceedings.* Substantive settlement negotiations for global resolution of this action commenced following the initial remand. (R. Vol. 11 Tr. 65, 92) In conjunction with entry of the court's order preliminarily approving the class action settlement agreement, the court scheduled a fairness hearing for August 27, 2002. Errors occurred, however, in the mailing of the notice of settlement. Consequently, the district court proceeded with the August 27 hearing but recessed it for continuation after issuance of supplemental notice. (R. Vol. 12 Tr. 306-10) Petitioners participated in this hearing through counsel.

Consistent with the supplemental notice, the district court resumed the fairness hearing on December 9, 2002. While some of Petitioners' lawyers who participated in the August 27 hearing elected not to attend this additional hearing, others did attend. At the conclusion of the December 9 hearing, the court invited submission of proposed findings of fact and conclusions of law from all interested persons. Petitioners made such submissions.

Although afforded three opportunities (September 20, 2001, August 27, 2002, and December 9, 2002), *not a single borrower/objector (now Petitioners) testified* to support the contention that this case involves unliquidated, individualized, substantial monetary damages claims. Rather, Petitioners' counsel at the August 27, 2002 fairness hearing described a very small monetary value of the compensatory damages claims as ranging from "maybe a couple of hundred dollars to maybe several thousands of dollars," an obvious reference to the insurance premiums paid. (R. Vol. 12 R. 286) Further, the district court directly asked objectors (today Petitioners) to just "give [him] one example" of an individual claim, which, from a compensatory damages perspective, would justify incurring the expense associated with litigation. (R. Vol. 12 Tr. 287) Petitioners' counsel did not identify any such claim. Instead, Petitioners' counsel asserted the objecting class members' interests would be pursued by "lump[ing]" together their common claims in state court. *See* Pet. 32a.[4]

4. *The District Court's Opinion Approving the Settlement and Maintaining Class Certification.* The district court's opinion approving the settlement addressed at length not only approval of the settlement but also continued certification of the class under Rule 23(b)(1)(A) and Rule 23(b)(2). After thorough exploration of all facets of the proposed settlement under generally accepted criteria for settlement evaluation, the district court found the settlement agreement fair, adequate and

[4] Such Petitioner contentions on the record in this case also belie Petitioners' reliance here on affidavits of other lawyers addressing other lawsuits and substantiate the district court's finding that such affidavits lacked probative value. *See* Pet. 40a, 73a.

reasonable, provided the parties accepted the court's modifications. (Pet. 107a)

The district court addressed the myriad objections to the settlement. The court flatly rejected objector contentions that the injunctive relief was meaningless. (Pet. 70a-71a) The court observed that objectors had "themselves specifically asked five different state courts to craft a court-ordered plan establishing future proceedings for insurance placement." (Pet. 71a) Noting objectors' conclusory contentions "that the Settlement 'dramatically undervalues the absent Class Members' claims,'" the court cited the objectors' failures to offer evidence of defendant wrongful conduct or of their alleged damages. (Pet. 72a) The court acknowledged objectors' citation of state court verdicts in select state court venues but concluded the objectors' mere reference to these verdicts without an evidentiary predicate afforded no basis for legitimate comparison. (Pet. 73a-74a) The court assessed the class representatives' numerous claims, and without reaching their ultimate merits, it found "significant barriers" existed to a favorable judgment. (Pet. 60a)

The district court also confronted the objectors' challenges to class certification. The court referenced its 1998 certification opinion laying out the bases for Rule 23(b)(1)(A) certification and objectors' failure to directly address the court's findings. The court found that the objectors' "boilerplate discussion" of the inapplicability of Rule 23(b)(1)(A) to damages actions lacked "probative value regarding the facts before this court." (Pet. 85a) In the words of the court:

> Plaintiffs' claims, including objectors' claims, cannot be construed at this late date as limited to separate proceedings for damages tied to the

> "same event." . . . The primary issue is not one of whether one jury finds damages to be owed for past conduct and another does not. At stake is how Tower could act prospectively if confronted with conflicting findings, including conflicting court-ordered plans establishing the future policies and practices to be followed. Such overriding questions are what led this court to conclude "this controversy squarely falls under Rule 23(b)(1)(A)."

(Pet. 86a)

As to Rule 23(b)(2) certification, objecting class members (Petitioners) contended that injunctive relief must be the predominant form of relief sought for certification to be appropriate under Rule 23(b)(2), and that under the Fifth Circuit's decision in *Allison* such relief did not predominate here. The district court held that under *Allison* the record established that injunctive relief predominated. The court rejected the objectors' contention that the parties were improperly looking to the settlement agreement rather than the complaint to substantiate the predominance of equitable relief. (Pet. 89a-90a) The court ultimately concluded that its 1998 findings in its original certification opinion continued to withstand scrutiny under the objectors' attacks. The district court held that "the global challenges of institutional practices, the multiple demands for injunctive relief by not only the Class Representatives but also specifically by a number of objectors, and the absence of genuine individualized claims all substantiate the genuineness of injunctive relief." (Pet. 100a)

In rejecting Petitioners' contention that the existence of individualized claims for substantial damages precluded

a finding that demands for injunctive relief predominated, the district court, among other things, found:

> There are no individualized claims for "mental suffering and other consequential damages, and the like." The Class Representatives do not allege any; no objectors substantively suggested any; and no basis exists for judicial speculation regarding any such individualized claims. As previously found by the Court, the Class Members' claims "are not individualized claims under *Allison*," for the damages amounts are "readily capable of computation by following the objective standards of calculating the amounts of insurance premiums charged plus the associated finance costs."

(Pet. 94a-95a)

The district court rejected the Petitioners' contention that mandatory class certification without opt-outs denied class members due process. Petitioners cited *Phillips Petroleum Co. v. Shutts*, 427 U.S. 797 (1985), "for the proposition that 'in class actions seeking to bind plaintiffs with respect to "claims wholly or predominantly for money damages,'" due process requires Class Members be afforded the opportunity to opt out." The district court properly viewed the present Rule 23(b)(1)(A) and (b)(2) class action as markedly different from the *Shutts* damages action under the Kansas version of Federal Rule of Civil Procedure 23(b)(3). Similarly, the district court found the Petitioners' reliance on *Ortiz*, a personal injury action addressing a class consisting of asbestos victims possessed of varying substantial damages claims, to be misplaced. The court also distinguished other cases recognizing opt-out rights for persons possessing unliquidated, individualized,

substantial damages claims. The court again noted "there are no such claims here." (Pet. 104a-106a)

5. ***The Court of Appeals' Per Curiam Opinion.*** On appeal the Petitioners contended that the certification of a non-opt-out class action under Rule 23(b)(2) where damages were the primary relief sought by the class was contrary to Fifth Circuit precedent as established in *Allison*. Petitioners asserted Rule 23(b)(1)(A) does not apply to class actions in which substantial damages are at issue. Petitioners further argued that mandatory class certification violates due process, maintaining that since *Shutts* and *Ortiz*, the circuit courts have regularly upheld the right to opt out whenever substantial money damages are at stake.

The court of appeals affirmed the district court in an unpublished, per curiam opinion. The court readily agreed with the district court that the class complaint and competing numerous claims already otherwise filed demanding injunctive relief to modify Tower's business practices created a risk of inconsistent adjudications. Finding no error in the certification under Rule 23(b)(1)(A), the court of appeals found it unnecessary to "address the alleged error regarding the district court's alternative holding certifying the class under 23(b)(2)." (Pet. 5a) The court held "it [to be] similarly clear that the district court did not abuse its discretion when it approved the parties' settlement." (Pet. 6a)

After addressing the certification under Rule 23(b)(1)(A), the adequacy of the settlement and contentions regarding the district court's not conducting a third fairness hearing, the court of appeals concluded its per curiam opinion as follows:

> In sum, we are convinced that the district court carefully considered all of the pertinent objections

> that were made to the settlement agreement. Indeed, the district court modified the settlement in several respects, including narrowing the release to ensure that certain claims were not barred by the settlement. It is therefore our view that the district court committed no reversible error in its thorough handling of this settlement and we AFFIRM essentially for the reasons given in its able opinion.

(Pet. 7a-8a)

Arguing that the panel's decision directly conflicted with the Fifth Circuit's decision in *Allison*, Petitioners sought rehearing en banc regarding the Rule 23(b)(1)(A) certification. Petitioners argued that in addition to "its flat inconsistency with *Allison*," the panel's decision conflicted with decisions of other circuit courts which do not permit mandatory classes of plaintiffs possessing substantial damages claims. Asserting that the panel "wholly ignored" their due process contentions, Petitioners also sought rehearing regarding alleged opt-out rights.

No member of the panel or in the regular active service of the court of appeals requested that the full court even be polled regarding the petition for en banc rehearing. Consequently, the court of appeals entered its standard per curiam order denying the petition for rehearing en banc.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Any Issue Worthy of This Court's Review.

A. Petitioners make much of two prior grants of review, in *Ticor* (1993) and *Adams* (1996). According to

Petitioners, the grants in those cases establish that the question they say is presented here – under what circumstances do damages claims make it inappropriate to certify a non-opt-out class action? – is worthy of this Court's attention. What Petitioners neglect to mention, however, is that, more recently, the Court has repeatedly *denied* petitions presenting that issue.[5] That the Court has done so is not surprising. Whatever may have been true at the time of *Ticor* and *Adams*, there is presently no conflict of authority that would warrant certiorari.

Before the Ninth Circuit's decision in *Ticor*, the courts of appeals were in unanimous agreement that a non-opt-out class action may be appropriate even when the plaintiffs demand not only injunctive and declaratory relief but also damages.[6] That unanimity persists today. Courts agree that certification is appropriate "so long as the

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[5] *See Bratcher v. National Standard Life Ins. Co. (In re Monumental Life Ins. Co.)*, 365 F.3d 408 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 277 (2004); *Bratcher v. National Standard Life Ins. Co. (In re Monumental Life Ins. Co.)*, No. 04-27, Petition for Writ of Certiorari at 2 (filed July 1, 2004) (raising question of "the appropriate standard for class certification under Fed. R. Civ. P. 23(b)(2), where, as here, the class seek injunctive relief and money damages"); *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); *Metro-N. Commuter R.R. Co. v. Robinson*, No. 01-908, Petition for Writ of Certiorari at i (filed Dec. 17, 2001) (raising question whether "the standards of class certification set forth in FRCP 23(b)(2) [can] be satisfied in an employment discrimination suit that seeks recovery of individualized relief, including compensatory damages").

[6] *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 124 (1994) (O'Connor, J., dissenting, joined by the Chief Justice and Kennedy, J.) ("The lower courts have consistently held that the presence of monetary damages claims does not preclude class certification under Rules 23(b)(1)(A) and (b)(2).").

predominant relief sought is injunctive or declaratory."[7] Although there is some tension among the circuits about exactly "how much" damages claim is "too much,"[8] there is and was broad agreement on the basic premise that certification is permissible when demands for injunctive relief predominate.

The petition in *Ticor* was granted, apparently, to enable the Court to consider whether it should correct a single Ninth Circuit decision that had held that damages claims made certification of a non-opt-out class improper.[9] The Ninth Circuit's decision had been described to the Court as adopting a "blanket requirement of opt-out rights in any case involving monetary claims," contrary to "a long line of circuit court decisions specifically rejecting due process challenges to mandatory class actions . . . involving monetary claims certified under Rule 23(b)(1) and (b)(2)."[10] After dismissal of the writ in *Ticor*, the Court apparently accepted *Adams* for review for a possible reconsideration of that question.[11]

Since *Ticor*, the Ninth Circuit's decision in that case has proven to be considerably less of a watershed event

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[7] *Allison*, 151 F.3d at 411; *see also Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443, 447 (6th Cir. 2002) (noting "apparent consensus that money damages are recoverable to some extent in a Rule 23(b)(2) class action").

[8] *See infra*.

[9] *See Ticor*, 511 U.S. at 124 (O'Connor, J., dissenting, joined by the Chief Justice and Kennedy, J.) (faulting Ninth Circuit for going beyond dictum in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985), with potentially "broad-ranging consequences").

[10] *Ticor Title Ins. Co. v. Brown*, No. 92-1988, Petition for Writ of Certiorari, at 12-13 (filed June 15, 1993).

[11] *Adams v. Robertson*, 520 U.S. 83, 92 n.6 (1997) (noting the *Ticor* dismissal and the Court's "continuing interest").

than it was argued to be in 1993. All along, the Ninth Circuit arguably saw an obstacle only in "substantial" damages claims, an approach not in conflict with prevailing "predominance" precedent in other circuits.[12] Moreover, since 1993, the Ninth Circuit has interpreted its *Ticor* precedent to be limited in precisely that way,[13] and has expressly rejected any blanket rule that any claim for money damages always makes a non-opt-out class improper.[14] No other circuit has adopted such a blanket rule.

Petitioners nevertheless claim that there is a conflict of authority by focusing on *Ticor*'s *result*. In *Ticor*, the Ninth Circuit held that damages claims precluded a non-opt-out class, whereas, in the instant case, the Fifth Circuit held that damages claims did not preclude a non-opt-out class. But, as already explained, in *Ticor*, there were *substantial* damages claims.[15] The district court in

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[12] *See Brown v. Ticor Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992).

[13] *See Molski v. Gleich*, 318 F.3d 937, 948 (9th Cir. 2003) ("we have held that certain minimal procedural safeguards, such as notice and the right to opt-out, must be provided to bind absent class members when substantial monetary damages are involved") (citing *Ticor*); *id.* at 950 ("we have held that statutory treble damages can be substantial and, thus, render the action a hybrid suit, in which minimum due process requires the right to opt out") (citing *Ticor*).

[14] *See Molski*, 318 F.3d at 949 ("[W]e have implicitly refuted Appellants' argument for the adoption of a per se rule. In recent cases, we have indicated that certification of a mandatory class may be appropriate even when monetary damages are involved."); *see also Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001) (certification appropriate if damages claims "are merely incidental to the litigation"); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1240 n.3 (9th Cir. 1998) ("This court has held that class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages.") (internal quotation marks and brackets omitted).

[15] *See supra*.

this case held that there were no such claims.[16] In an unpublished decision, the Fifth Circuit affirmed. Whether those determinations were correct is utterly bound up with the facts,[17] and subject to deferential review.[18] This Court does not ordinarily review such findings[19] – particularly district court findings not disturbed by the court of appeals[20] in a per curiam affirmance by unpublished opinion.[21]

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[16] *See* Pet. 105a ("These contentions . . . rest on alleged rights of persons possessed of unliquidated, individualized, substantial damages claims. [T]here are no such claims here."); Pet. 17a ("Even if the monetary relief sought by the class were termed nonequitable, (b)(2) certification would nonetheless remain appropriate. Such 'damages' would be 'incidental' under *Allison*."); Pet 92a-93a ("any so called 'damages' are 'incidental' under *Allison*").

[17] *See, e.g.*, *Allison*, 151 F.3d at 416 ("We recognize that, as a matter of degree, whether a given monetary remedy qualifies as incidental damages will not always be a precise determination. . . . The district courts, in the exercise of their discretion, are in the best position to assess whether a monetary remedy is sufficiently incidental to a claim for injunctive or declaratory relief to be appropriate in a (b)(2) class action.").

[18] *See id.* at 418 n.12 ("under the abuse of discretion standard, we are required to defer to the judgments of the district courts as to whether certain monetary relief predominates over injunctive or declaratory relief in any given case").

[19] *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *see* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

[20] *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not lightly overturn the concurrent findings of the two lower courts.") (internal quotation marks omitted).

[21] *See Lawrence v. Chater*, 516 U.S. 163, 170 (1996) ("while not immune from our plenary review, ambiguous summary dispositions below tend, by their very nature, to lack the precedential significance

(Continued on following page)

B. If there is tension among the circuits at all, it is about the issue of precisely "how much" damages claim is "too much." Although all circuits agree that the inquiry under Rule 23(b)(2) should turn on whether damages are the "predominant form of relief sought by the class,"[22] courts have differed in their precise "formulation" of the "predomination requirement."[23] But, assuming that there truly is discord among the circuits, Petitioners cannot profit from it.

In its *Allison* decision (which Petitioners correctly describe as the "leading" case),[24] the Fifth Circuit settled on a standard under which the assertion of damages claims renders a case unsuitable for a mandatory class action unless those damages claims are purely "incidental to requested injunctive or declaratory relief."[25] Under this test, damages claims do not stand in the way of a non-opt-out class when they "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[26] When that is true, certification is particularly appropriate – damages do not depend "on the intangible, subjective differences of each class member's circumstances," and do not "entail complex individualized determinations."[27] The *Allison* approach

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that we generally look for in deciding whether to exercise our discretion to grant plenary review").

[22] *Molski*, 318 F.3d at 949.

[23] *Allison*, 151 F.3d at 411.

[24] Pet. 17.

[25] *Allison*, 151 F.3d at 415.

[26] *Id.*

[27] *Id.*

has been adopted by a majority of the Circuits.[28] Contrary to Petitioners' suggestion, the Seventh Circuit is firmly part of that majority.[29]

Admittedly, the Second and Ninth Circuits have rejected *Allison*.[30] These courts have adopted a standard under which "predominance" is determined not through any "bright-line test," but on the basis of all "the specific facts and circumstances of each case."[31] Expressing concern for district court discretion and the certification of civil rights actions, the Ninth Circuit has made clear that, under this "ad hoc balancing" approach, class actions may be certified even if they would not pass muster under the *Allison*

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[28] *See, e.g., Barabin v. Aramark Corp.*, No. 02-8057, 2003 WL 355417, at *1 (3d Cir. Jan. 24, 2003) ("a court may only certify a class if the damages claim is incidental to the primary claim for injunctive or declaratory relief"); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (same).

[29] *See Lemon v. International Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000) ("we adopted the Fifth Circuit's reasoning on this point from *Allison*"); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) ("we agree with the Fifth Circuit's principal holding in *Allison*").

[30] *See Molski*, 318 F.3d at 949 ("we refuse to adopt the approach set forth in *Allison*"); *Robinson*, 267 F.3d at 164 ("we . . . decline to adopt the incidental damages approach set out by the Fifth Circuit in *Allison*").

[31] *Molski*, 318 F.3d at 950; *see Robinson*, 267 F.3d at 164 ("a district court must consider the evidence presented at a class certification hearing and the arguments of counsel, and then assess whether (b)(2) certification is appropriate in light of the relative importance of the remedies sought, given all of the facts and circumstances of the case") (internal quotation marks and brackets omitted); *id.* ("the assessment of whether injunctive or declaratory relief predominates will require an ad hoc balancing that will vary from case to case").

test.[32] Likewise, the Second Circuit has described the *Allison* test as being "unduly stringent."[33]

One might well ask whether the difference in wording amounts to a conflict of authority, or whether it reflects merely different formulations leading to largely similar results.[34] However that may be, if Petitioners (who oppose non-opt-out class certification) cannot prevail under the Fifth Circuit's exacting test, they certainly cannot prevail under the test of the Second and Ninth Circuits, which allows non-opt-out classes more liberally. Thus, any disagreement between the *Allison* courts on the one hand and the Second and Ninth Circuits on the other is not implicated here.[35]

C. Because Petitioners lose under the settled approach of *all* circuits, the only question that Petitioners could seek to present is whether this Court should consider rejecting that approach – by holding that even the slightest claim for damages makes a case entirely unsuitable for

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[32] *See Molski*, 318 F.3d at 950 ("[A]doption of a bright-line rule distinguishing between incidental and nonincidental damages for the purposes of determining predominance would nullify the discretion vested in the district courts through Rule 23. . . . In addition, such a bright-line rule holds troubling implications for the viability of future civil rights actions . . . .").

[33] *Robinson*, 267 F.3d at 162.

[34] *Cf. Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

[35] *Cf. Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, Circuit Justice) ("Given the significant nature of the issue and the acknowledged disagreement among the lower courts, the Court, in my view, should examine and resolve the question in an appropriate case. This, however, is not an appropriate case. [¶] Applicant is unlikely to prevail in his request for a stay under either of the standards adopted by the Courts of Appeals.").

non-opt-out treatment. It is questionable whether Petitioners are entitled to present this question. Petitioners never urged the court of appeals to re-evaluate the *Allison* standard.[36] In any event, evaluating that standard would be a poor use of this Court's time, for two reasons.

First, there is no reason whatsoever to believe that the currently prevailing *Allison* approach is wrong. Judge Jolly's *Allison* opinion took its cue from the Advisory Committee Notes to Rule 23,[37] and reflected a careful analysis of the "balance struck in each case between the need and efficiency of a class action and the interests of class members to pursue their claims separately or not at all."[38] In addition, *Allison* is entirely consistent with the *dictum* that this Court uttered in *Shutts*, which identified due process concerns only in connection with "claims wholly or predominantly for money judgments," not in connection with "other types of class actions, such as those seeking equitable relief."[39] Likewise, the *Allison* test is congruent with *Ortiz*. Although the Court there repeated the *Shutts* dictum,[40] it stopped well short of suggesting that even a peppercorn of damages precludes a

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[36] *Cf. Bratcher v. National Standard Life Ins. Co.* (*In re Monumental Life Ins. Co.*), No. 04-27, Brief in Opposition Petition for Writ of Certiorari at 4 (filed Aug. 9, 2004) ("All parties accepted *Allison* as the applicable standard. . . .").

[37] *See* Advisory Committee Notes to Rule 23, 39 F.R.D. 98, 102 (1966) (Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages"); *Allison*, 151 F.3d at 411 ("This commentary implies that the drafters of Rule 23 believed that at least some form or amount of monetary relief would be permissible in a (b)(2) class action.").

[38] *Id.* at 412.

[39] *Shutts*, 472 U.S. at 811 n.3.

[40] *See Ortiz*, 527 U.S. at 847-48.

non-opt-out class.[41] And to the extent that courts have criticized *Allison*'s approach to non-opt-out certification at all, it is for being too exacting – not for being too liberal.[42]

Second, if, as Petitioners imply, this Court meant to use *Ticor* and *Adams* to raise the bar for non-opt-out certification,[43] Petitioners are wrong in painting those cases as having failed to accomplish the Court's mission. The courts of appeals have read the dismissal orders in those cases, along with the language in *Ortiz*, as delivering warnings about the dangers of mandatory class actions.[44] Unless the Court is actively considering adopting a *per se* rule, there is no good reason to believe that it can materially improve upon the "predominance" jurisprudence that has been developed – to increasingly exacting effect – by all courts of appeals uniformly. There simply is no cause to revisit this area, particularly so soon after *Ortiz*.

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[41] *See Molski*, 318 F.3d at 948 ("we disagree that *Ortiz* requires adoption of this per se rule").

[42] *See supra*.

[43] *But see Ticor*, 511 U.S. at 125 (O'Connor, J., dissenting, joined by the Chief Justice and Kennedy, J.) (noting that Ninth Circuit's decision may have gone beyond dictum in *Shutts*, 472 U.S. at 811 n.3, with potentially "broad-ranging consequences").

[44] *See, e.g.*, *Molski*, 318 F.3d at 948 ("we recognize the Court's growing concerns regarding the certification of mandatory classes when monetary damages are involved"); *Jefferson*, 195 F.3d at 899 ("*Ortiz* . . . says in no uncertain terms that class members' rights to notice and an opportunity to opt out should be preserved whenever possible").

II. This Case Is a Poor Vehicle to Evaluate the Circumstances Under Which District Courts May Certify Non-Opt-Out Class Actions.

Even if this Court were inclined to re-evaluate the standards under which district courts may certify non-opt-out class actions, this case would not provide a suitable vehicle for that purpose – for four reasons.

First, this case hails from the Fifth Circuit, which – as explained above – applies the exacting "purely incidental" test. If the Court were at all interested in re-evaluating the circumstances under which district courts may certify non-opt-out class actions, it should do so in a case from the Second or Ninth Circuits, which apply the less exacting "ad hoc balancing" test. That way, the Court would have all three possibilities before it: (1) ad hoc balancing (adopted by the Second and Ninth Circuits), (2) the "purely incidental" test (adopted by all other circuits); and (3) *per se* prohibition (to date adopted by no court). If the Court were to grant review in this case and find the *Allison* test to be constitutionally permissible, the constitutionality of the "ad hoc balancing" test would remain in doubt. That may well be why the Court denied certiorari in *Bratcher*, another case from the Fifth Circuit.

Second, published cases indicate that the vast majority of non-opt-out class actions are certified under Fed. R. Civ. P. Rule 23(b)(2). In contrast, the court of appeals in this case relied only on Rule 23(b)(1)(A). Class actions under the latter rule may present special considerations. For example, Petitioners themselves assert that the circuits are split on the question whether the well-developed standards that courts have adopted with respect to (b)(2) actions also apply with respect to comparatively rarer (b)(1) actions. Although that particular assertion

appears unfounded as Petitioners point only to the decision below as being out of step,[45] it underscores that the Court should not grant review in a case that may turn on the eccentricities of a rarely invoked rule.

Third, even if – as Petitioners claim – certification of a non-opt-out-class could in theory violate due process, the unusual procedural background of this case makes it unlikely that a violation occurred here. In the district court, Petitioners received much more "process" than the usual non-opt-out class member. Although notice is not required in a non-opt-out class, the district court required that all class members be given individual notice by mail.[46] Interested parties were given ample opportunity to submit briefs and participate at hearings.[47] Petitioners appeared and participated through their own lawyers.[48] Because due process ordinarily requires no more than notice and an opportunity to be heard,[49] Petitioners likely received – or could have received – all the "process" that was "due."[50]

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[45] The decision below is unpublished and therefore cannot establish the law of the circuit. Moreover, the court's opinion nowhere states that (b)(1) class actions need not meet the predominance test. To the contrary, the court expressly cited *Allison*. *See* Pet. 3a.

[46] *See* Pet. 24a-26a, 33a-35a.

[47] *See* Pet. 32a ("All counsel were afforded liberal opportunities to be heard.").

[48] *See* Pet. ii, 7.

[49] *See, e.g.*, *Shutts*, 472 U.S. at 812 ("The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.").

[50] *See* Pet. 106a; *see also Eubanks v. Billington*, 110 F.3d 87, 96 n.15 (D.C. Cir. 1997); *Kincade v. General Tire and Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1981); *cf. Bratcher*, 365 F.3d at 417 & n.13; *Grimes v. Vitalink Communication Co.*, 17 F.3d 1553 (3rd Cir. 1994), *cert. denied*, 513 U.S. 986 (1994).

The possibility of this alternative ground for affirmance renders this case a poor vehicle.[51]

Finally, the issue that Petitioners seek to present – under what circumstances does a plaintiff have a right to litigate individually? – is not truly implicated in this case. Petitioners do not desire to proceed in individual actions.[52] Indeed, in the district court, some of the objectors were represented by counsel who had originally filed a non-opt-out class action of his own.[53] Currently, Petitioners desire to proceed by way of massed, multi-plaintiff state court cases that are tantamount to unregulated class actions.[54] This dispute is not about whether plaintiffs are being denied an individual opportunity to be heard and consequently is not an appropriate case in which to debate the suitability of class certification.

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[51] *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* 457 (8th ed. 2002) ("[T]here may be other legal grounds for affirmance that demonstrate that the decision below is correct regardless of how the Court resolves the question presented, such that the Court would not likely reach the question and the decision would be robbed of any practical significance.").

[52] *See* Pet. 30a ("No objector maintains this controversy should not have been certified as a class action proceeding."); (Pet. 83a) ("Objectors do not contend this proceeding should not be certified as a class action under Rule 23."). Indeed, in the district court, some of the objectors were represented by counsel who had originally filed a non-opt-out class action of his own. *See* Pet. 10a-13a, 101a-102a

[53] *See* Pet. 10a-13a, 101a-102a.

[54] *See* Pet. 11a-12a, 31a-32a.

CONCLUSION

The petition for writ of certiorari should be denied.

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